(b) It did not follow Illinois decisions holding that the propriety of the corporate use of real estate is to be determined by the express and implied powers of the corporation and the decisions holding that corporations, including railroad corporations, owning real estate in good faith, against present or future requirements, may temporarily lease portions thereof to third persons, in order to obtain revenue.

PRAYER FOR RELIEF.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit to certify the record, to the end that the judgment of that court entered April 8, 1942 (rehearing denied June 9, 1942) be reversed with directions to affirm the decree of the District Court in this case.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The statement of the ground on which the jurisdiction of this court is invoked, a concise statement of the case containing all that is material to the consideration of the questions presented, and specification of errors to be urged, are contained in the accompanying petition.

SUMMARY OF ARGUMENT.

I.

THE CAMP DEED CONVEYED FEE SIMPLE TITLE, AND NOT AN EASEMENT AS DECIDED BY THE CIRCUIT COURT OF APPEALS IN ITS SECOND OPINION IN THIS CASE.

(a) The Circuit Court of Appeals erred in relying primarily upon *Tallman* v. *Eastern Illinois & Peoria R. Co.*, Ill. Sup. March 17, 1942, 41 N. E. (2d) 537, and in according to that case wholly unwarranted significance.

(b) The Court erred in holding that the *Tallman* Case made unnecessary any discussion of the Illinois Supreme Court's decisions in *Downen* v. *Rayburn*, 214 Ill. 342, *Tinker* v. *Forbes*, 136 Ill. 221, and *Board of Supervisors* v. *Patterson*, 56 Ill. 111, which are authority for the proposition that the Camp deed conveyed the fee.

(c) The Court erred in failing to decide that, under the Illinois decisions, particularly, *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516, the respondents, in order to prevail, should have proved, but did not prove, that the language of the Camp deed, the attendant circumstances and the objects in view, as well as the interpretation of the parties, disclosed an intention to grant an easement rather than the fee.

II.

THE LEASE AND USE OF THE PROPERTY IN QUESTION FOR A FILLING STATION IS PROPER.

(a) The Circuit Court of Appeals' holding with respect to the lease to Lockwood is founded upon an *obiter dictum* in an Illinois decision, in the face of the rule in that State

that an opinion of its Supreme Court is authority only for what is actually decided.

(b) The Circuit Court of Appeals erred in failing to follow Illinois decisions holding that the propriety of the corporate use of real estate is to be determined by the express and implied powers of the corporation and the decisions holding that corporations, including railroad corporations, owning real estate in good faith, against present or future requirements, may temporarily lease portions thereof to third persons, in order to obtain revenue.

ARGUMENT.

I.

THE CAMP DEED CONVEYED FEE SIMPLE TITLE AND NOT AN EASEMENT AS DECIDED BY THE CIRCUIT COURT OF APPEALS IN ITS SECOND OPINION IN THIS CASE.

The Circuit Court of Appeals reached a correct result in its first opinion (R. 210), when it held that the Camp deed conveyed fee title, but, in that opinion, the court made a mistake which it perpetuated in its second opinion (R. 218), for it held that the words in the *habendum* clause, if given effect, would create an easement. In the first opinion, the Circuit Court of Appeals discarded the *habendum* clause as being repugnant to the granting clause, but in its second opinion the court held that the entire deed must be considered, and stated that the liberal rules of construction which were reaffirmed by the Illinois courts as recently as *Tallman* v. *Eastern Illinois & Peoria Railroad Company* (opinion of March 17, 1942), 41 N. E. (2d) 537, must be applied (R. 223). It has been, and still is, the position of the petitioners that the words "for railroad purposes only," which appear in the *habendum* clause of the Camp

deed, are a mere recitation of the purpose of the conveyance. At no time in the course of this litigation have the petitioners admitted that there is anything inconsistent between the granting clause and *habendum* clause of that deed.

It is interesting to note that the doctrine of the Illinois cases, as we conceive it to be, in respect to deeds containing language similar to that in the Camp deed, is in accord with the law generally, whereas, the doctrine of those cases as the court below erroneously construed it, is contrary to the law generally.*

(a) The Circuit Court of Appeals erred in relying primarily upon Tallman v. Eastern Illinois & Peoria R. Co., Ill. Sup. March 17, 1942, 41 N. E. (2d) 537, and in according to that case wholly unwarranted significance.

The Supreme Court of Illinois in the *Tallman* Case had before it a deed entirely different from that here in question. We are setting forth, as Appendix B hereof, a copy of the deed in the *Tallman* Case so that it readily may be compared with the Camp deed, which is printed as Appendix A. Particular attention is directed to the fact that the *Tallman* Case deed contains the words "right of way" in three places and also contains the words "over and across" and to the further fact that in the deed here in question any reference to "right of way" is omitted and the words "over and across" are absent.

The Supreme Court of Illinois said in the *Tallman* Case, 41 N. E. (2d) 537, at page 540:

> "The deed under consideration contains words describing a subject matter which if used separately could each describe a different estate, one of which would be an easement, and the other the fee simple of land contained in the description. In short, if the

* *Quinn* v. *Pere Marquette Ry. Co.*, 256 Mich. 143; 239 N. W. 376, 379.
Phillips Gas & Oil Co. v. *Lingenfelter*, 262 Pa. 500; 105 Atl. 888, 889.

> words 'a strip of land' were absent from the conveyance an easement in fee would pass to the grantee without question; whereas, on the other hand, if all reference to right of way were eliminated a fee simple in the land would result under the authority of *Spierling* v. *Ohl,* 232 Ill. 581, 83 N. E. 1068, 13 Ann. Cas. 430. * * * Upon examination of the deed involved the repeated use of the words 'right of way' attracts attention. * * * The words 'right of way' denote a tenure by which land is held; they are descriptive of the easement right, and not the land to which it is affixed."

Admittedly, in the Camp deed the only words which may be pointed to by the respondents as in any way tending to support their contention that an easement only was conveyed are those contained in the *habendum* clause reading "for railroad purposes only." Those words, we submit, are not at all analagous to the language contained in the *Tallman* Case deed, which was construed to pass an easement. As stated by the Supreme Court of Illinois, "the words 'right of way' denote a tenure by which land is held," but nothing that the Supreme Court of Illinois has said may be construed to mean that a statement of *use* "denotes a tenure by which land is held."

The Circuit Court of Appeals, in the opinion here sought to be reviewed, said (R. 223):

> "It would seem reasonable that the grantor meant the railroad could use the strips, but only for the expressed purposes."

Of course, the grantor meant that the strips could be used for railroad purposes only but what the Court lost sight of is the fact that *use* is a privilege of a holder of the fee as well as a grantee under an easement.

The Circuit Court of Appeals also said (R. 223):

> "The words in the *habendum* were more than descriptive of purpose: they were the essence of the whole grant made by Camp; they were intended to describe the estate."

We submit that in the sentence just quoted the Court begged the crucial question in this case. When the Court indicated that the controversial words "were the essence of the whole grant made by Camp," we believe, it only meant that those words indicated that the subject matter of the grant should be restricted to a specified use. The subject matter of the grant could just as logically be an absolute fee simple title as an easement. The Court's conclusion that "they were intended to describe the estate" is a *non sequitur*.

The Circuit Court of Appeals then said (R. 223):

> "We must therefore hold that the Camp deed gave the railroad only an easement" (citing *Tallman* v. *Eastern Illinois & Peoria R. Co.*, 41 N. E. (2d) 537).

We believe that a careful reading of the *Tallman* Case can lead only to the conclusion that nothing therein contained supports the holding that the Camp deed gave the railroad an easement rather than fee title.

(b) The Court erred in holding that the Tallman Case made unnecessary any discussion of the Illinois Supreme Court's decisions in Downen v. Rayburn, 214 Ill. 342, Tinker v. Forbes, 136 Ill. 221, and Board of Supervisors v. Patterson, 56 Ill. 111, which are authortiy for the proposition that the Camp deed conveyed the fee.

The Circuit Court of Appeals in its opinion of April 8, 1942, said (R. 224):

> "Appellees cite *Carter Oil* v. *Welker*, 112 F. (2d) 299; *Downen* v. *Rayburn*, 214 Ill. 342; *Tinker* v. *Forbes*, 136 Ill. 221, and *Supervisors* v. *Patterson*, 56 Ill. 111, as authority for the proposition that a fee was given. It is sufficient to say that the *Tallman* case makes any discussion of these cases unnecessary."

The deed in *Carter Oil Co.* v. *Welker*, 112 F. (2d) 299, and the deed in the *Tallman* Case are nearly identical and

we therefore agree with the Circuit Court of Appeals that, in view of the *Tallman* Case, any discussion of the *Carter Oil Company* Case is unnecessary. We submit, however, that the Court misunderstood the *Tallman* Case when it said that the decision therein made unnecessary any discussion of *Downen* v. *Rayburn, Tinker* v. *Forbes,* and *Board of Supervisors* v. *Patterson.*

The Supreme Court of Illinois said in the *Tallman* Case, 41 N. E. (2d) 537, (p. 541):

> "The *Patterson case,* after the word 'grant' contains a recital that the lot was conveyed for the purpose of building thereon a court house. The *Downen case* in like manner provided that the land should be used for a church location. In neither case was a right of reentry for conditions broken reserved. The purposes set out did not describe 'an estate,' nor was there anything in the deeds to make the words effective as a condition."

In the *Tallman* Case, when referring to *Tinker* v. *Forbes,* the Supreme Court of Illinois said (p. 541):

> "In that case the deed contained a provision that land was to be used as a location for a water wheel, which was held descriptive of a purpose not limiting the fee, but the same deed also contained another clause, viz.—'no building is to be erected' as to create a fire hazard, which, notwithstanding the words of general grant, were given effect as an easement and enforcible by an adjoining property owner. In the Forbes deed we perceive that words creating an easement were given effect, and general purpose words given no effect."

It is important to understand that the general purpose words in the Forbes deed which did not limit the fee were "for the purpose of locating proper water-wheel and races, to draw said water" and that the building restrictions, which followed, were held not to change the fee in the land conveyed to an easement, but to provide a reservation to

the grantor of an incorporeal right in the land granted, such right being an equitable easement. *We wish to emphasize that in the Forbes deed the grantor reserved an easement for the benefit of adjoining property and the grantee obtained the fee, subject to that easement.* This reservation is made amply plain in the opinion in *Tinker* v. *Forbes,* 136 Ill. 221, where the Court said (pp. 241-42):

> "The limitation in that deed is in the nature of an exception or reservation to the grantor of an incorporeal right in the land granted, and the reservation being made for the benefit of the adjoining half lot, such right is in the nature of an equitable easement appurtenant to that half lot. *Fuller* v. *Arms,* 45 Vt. 400; *Ayling* v. *Kramer,* 133 Mass. 12; 2 Washburn on Real Property, 2. The conveyance of the west half of said lot through mesne conveyances to the complainant, vested said easement in her as appurtenant to the property thus conveyed. Where an easement has become appurtenant to a dominant estate, a conveyance of that estate carries with it the easement belonging to it, whether mentioned in the deed or not. 2 Washburn on Real Property, 317."

In the *Tallman* Case, the Supreme Court of Illinois said that its attention had been called to decisions of the United States Courts in the Seventh and Eighth Circuits, construing the Illinois law as applied to deeds containing substantially the same provisions wherein different conclusions had been reached in the two Circuits and then said (p. 543):

> "We recognize the great respect to which the opinions of these courts are entitled, but deem it unnecessary to comment upon the analysis of the law therein expressed further than to say all of the cases cited were announced prior to the case of *Magnolia Petroleum Co.* v. *West, supra* [374 Ill. 516], wherein we pointed out the application of the Conveyance Act to deeds of this character, and the limited effect of the *Downen* and like cases."

The Supreme Court of Illinois in *Magnolia Petroleum Co.* v. *West,* 374 Ill. 516, in commenting upon *Downen* v. *Rayburn* and *Board of Supervisors* v. *Patterson,* said (page 522):

> "Each of the latter cases was predicated upon a conveyance of the fee, holding that it could not be restricted by subsequent language descriptive of its use."

If the Circuit Court of Appeals, when it said that it was not necessary to discuss *Downen* v. *Rayburn, Tinker* v. *Forbes* and *Board of Supervisors* v. *Patterson,* meant that the *Tallman* Case overruled those earlier Illinois decisions, the above quotations show that the Circuit Court of Appeals was in error. If, on the other hand, the Court did not mean to indicate its understanding that the earlier decisions were overruled, it erred in failing to give recognition to those cases, for they support the proposition that the Camp deed conveyed fee title.

(c) The Court erred in failing to decide that under the Illinois decisions, particularly, Magnolia Petroleum Co. v. West, 374 Ill. 516, the respondents, in order to prevail, should have proved, but did not prove, that the language of the Camp deed, the attendant circumstances and the objects in view, as well as the interpretation of the parties, disclosed an intention to grant an easement rather than the fee.

The court below, in its second opinion, referred to the decision of this Court in *Thompson, Trustee* v. *Magnolia Petroleum Co., et al.,* 309 U. S. 478, wherein it was held that the bankruptcy court abused its discretion by not sending a question of Illinois property law to the appropriate state court. The court below then said (R. 222):

> "Clearly, in the light of recent Illinois decisions, there is no such uncertainty as to require sending the case to the state court."

The "recent Illinois decisions" are the *Tallman* Case, which the Circuit Court of Appeals relied upon principally, and *Magnolia Petroleum Co.* v. *West,* 374 Ill. 516 (decided in 1940). Both of these cases were decided after the case here sought to be reviewed was briefed, argued and decided the first time by the Circuit Court of Appeals (R. 210). In its opinion, the Circuit Court of Appeals does not lay much stress upon the *West* Case, but it should here be pointed out that, like the *Tallman* Case, the *West* Case furnished no support for the Circuit Court of Appeals' holding that the Camp deed did not convey the fee. The Supreme Court of Illinois explained its holding that an easement only was granted in the *West* Case as follows (p. 523):

> "The words of limitation in the deed from Beattie Francis to August Wiese, as applied to the conveyance of a narrow strip running along the edge of the grantor's property from the road to the land of the grantee, discloses an intention to grant merely a right of way, and the words 'convey and warrant' are as compatible with this intention as with the conveyance of a fee. *The language of limitation, 'to be used for road purpose,' is ambiguous. Surrounding circumstances and the objects of the parties fortify the construction that an easement was intended.* The location of the Wiese property, having no connection with the road, the use of the Francis tract as a means of access, and the position of the strip, not adjoining the grantee's other tract, so that it might be utilized as more than a roadway, all compel this conclusion. Moreover, Wiese and his heirs have interpreted the deed in accordance with this evident intention. They did not cultivate, but used the strip only as a road. In various inventories and the lease to T. R. May, purporting to cover all of their interests in section 15, they asserted no title to the strip, and in an amended inventory, filed after the execution of the Hamilton lease, claimed an interest in it only as a roadway. *The language of the deed, the attendant circumstances and the objects in view, as well as the*

interpretation of the parties clearly disclose an intention to grant no more than an easement." (Emphasis supplied.)

Applying the criteria provided in the above excerpt from the *West* Case to the record herein, it is obvious that the respondents failed to prove that by the Camp deed anything less than fee title was conveyed. The Supreme Court said in the *West* Case that the words "to be used for road purpose" are ambiguous. We believe that the words in the Camp deed reading "for railroad purposes only" are perfectly plain. The grant in our case was to a trustee of a railroad and "his successor forever" and it was reasonable to suppose that any and all property which that railroad trustee "or his successor" held would be used for railroad purposes. Any other use, would be *ultra vires*. That fact, however, could not prevent the Trustee, or the railroad company from holding fee title to the property conveyed by the Camps, or to any other property. *Spierling* v. *Ohl*, 232 Ill. 581.

The intention of the grantees in the Camp deed to convey fee simple title to the railroad trustee is made doubly plain by the second certificate which is attached to and made part of that deed (R. 99-100). That certificate reads as follows:

"State of Illinois }
"Su County. } ss.

"I, Charles Ruxton, a Notary Public for town of Dixon in and for said County in the State aforesaid do hereby certify that Mary A. Camp and James S. Camp who are personally known to me as the real persons whose names are subscribed to the within deed appeared before me this day in person and acknowledged that they executed and delivered the said deed as their free and voluntary act for the uses and

purposes therein set forth. And the said Mary A. Camp wife of the said James S. Camp having been by me examined separate and apart and out of the hearing of her husband and *the contents and meaning of the said deed having been by me made known and fully explained to her acknowledged that she had freely and voluntarily executed the same and relinquished her dower and all other interest of any kind whatsoever to the lands and tenements therein mentioned without compulsion of her said husband and that she does not wish to retract the same.* Given under my hand and Notarial seal this fifth day of September, A. D. 1863. (Emphasis supplied.)

Charles Ruxton
SS N.P."

The record shows that Mary A. Camp acquired title to the property here involved in 1854 (R. 95-96).

If the language of the Camp deed were ambiguous and if it were necessary, for that reason, as in the *West* Case, to attempt to discover the intention of the parties at the time the deed was executed, what better evidence could have been offered than the certificate of the Notary Public who examined the grantors and explained to Mrs. Camp the meaning of the deed and who recorded that she "*relinquished her dower and all other interest of any kind whatsoever to the lands and tenements therein mentioned* • • •"?

We believe that if it is not clear that we are correct in our interpretation of the Illinois law, as applied to the facts in this case, the most that can be said on behalf of the respondents is that some "uncertainty" exists. In that event, we assume that this Court will follow its decision in *Thompson, Trustee,* v. *Magnolia Petroleum Co., et al.,* 309 U. S. 478, and require the questions here presented to be submitted to the Illinois courts.

II.

THE LEASE AND USE OF THE PROPERTY IN QUESTION FOR A FILLING STATION IS PROPER.

The opinion of the Circuit Court of Appeals (R. 218-225) finds that:

(1) The line of railroad involved is five and one-half miles in length;

(2) The area served is rich in potential and industrial developments, and the line serves private industries and is avaliable to the shipping public;

(3) The line is presently in operation and produced $200,000 in revenue in 1937; and

(4) The lease of the property to Lockwood contained a provision empowering either party to terminate it on 30 days' notice.

There is no suggestion of bad faith on the part of the railroad in respect to the quantity of land originally acquired and now held at the point in question. It is not intimated that the railroad failed to exercise fair discretion or judgment as to the amount of land necessary to meet possible requirements. The leasing of the land to Lockwood did not impede or hinder the trustee of the railroad in the discharge of his duty to the public.

The problem then becomes this: May a railroad which holds land for railroad purposes lease a part thereof, temporarily, to a third person, such part not being presently necessary for actual operation, and in so doing stay within the limits defined as "railroad purposes"? The Circuit Court of Appeals answered that question in the negative and held that the lease and use of a portion of the property for a filling station was a misuse of the servient land. We

believe that the applicable decisions of the Illinois Supreme Court do not support the holding of the Circuit Court of Appeals but, on the contrary, afford ample authority for holding that, even if the court were correct in concluding that the trustee of the Chicago and North Western Railway Company has only an easement in the property conveyed by the Camp deed, the lease to Lockwood is a proper railroad use.

(a) The Circuit Court of Appeals' holding with respect to the lease to Lockwood is founded upon an obiter dictum in an Illinois decision, in the face of the rule in that state that an opinion of its Supreme Court is authority only for what is actually decided.

The position of the Circuit Court of Appeals was bottomed upon a quotation from *R. I. & P. Ry. Co.* v. *Leisy Brewing Co.*, 174 Ill. 547, 549. The Circuit Court of Appeals quoted language from Lance's Appeal, 55 Pa. St. 16, as having been "expressly approved" in the *Leisy Brewing Co.* Case. An inspection of the latter case reveals that, while the Supreme Court of Illinois did say that it did not doubt the correctness of the doctrine laid down in numerous cases, including Lance's Appeal, the statement was plain *obiter dictum*, for the Court immediately went on to state "the cases referred to by counsel have no relation to the matters here under consideration." The decision in the *Leisy Brewing Co.* Case is authority only for what was actually there decided and not for the proposition relied on by the Circuit Court of Appeals in its opinion. *People* v. *Chapman*, 370 Ill. 430, 435.

(b) The Circuit Court of Appeals erred in failing to follow Illinois decisions holding that the propriety of the corporate use of real estate is to be determined by the express and implied powers of the corporation and the decisions holding that corporations, including railroad corporations,

owning real estate in good faith, against present or future requirements, may temporarily lease portions thereof to third persons, in order to obtain revenue.

In relying upon the dictum in the *Leisy Brewing Co.* Case, the Circuit Court of Appeals by-passed a determinative formula established by Illinois decisions. This formula develops as follows:

(1) In respect to real estate holdings, whether in fee by an industrial corporation or an easement by a railroad company, the company can acquire and hold the property only for its corporate or railroad purposes.

> *People* v. *Pullman Palace Car Co.*, 175 Ill. 125;
> *C. & N. W. Ry. Co.* v. *Town of Cicero*, 157 Ill. 48, 53.

(2) In such acquisition and holding, the company is not limited to its immediate requirements but may make provision for possible future needs. *People* v. *Pullman Palace Car Co.*, 175 Ill. 125.

(3) When properties so held, or facilities constructed thereon, are not immediately needed for operating purposes, the company may, by temporary arrangement by lease or contract, acquire revenue therefrom; and it is not required to let property held in good faith become unproductive.

> *People* v. *Pullman Palace Car Co.*, 175 Ill. 125;
> *Dickman* v. *Madison County Light Company*, 304 Ill. 470;
> *Dauchy Iron Works* v. *Grunder*, 150 Ill. App. 604, 608.

When the Camps deeded the land for railroad purposes, they conveyed it for those uses which then were, and in the

future would be, lawful uses by a railroad company in the operation of its road. The land was subject to use by the grantee under its express and implied powers. To interpret the grant otherwise, would lead to utter confusion.

A direct application of the above mentioned formula to a railroad company was made in the case of *Dickman* v. *Madison County Light Co.*, 304 Ill. 470. There, it appeared that the railroad, anticipating future requirements, erected a power plant generating excess power. It contracted to sell the excess to the power company. To deliver the power, it constructed and maintained a power line on its right of way easement. The wires of the power line were owned by the power company. The current so delivered was of a nature not usable by the railroad.

The owner of the servient land made a direct attack against the power company, contending that the additional use was unlawful and was an unwarranted burden. In disposing of the contention the Supreme Court of Illinois stated in its opinion (p. 483):

> "It [the contract between the companies]* is legal if the excess power was provided for in good faith by the Traction Company for its future requirements as a railroad company, provided a further showing is made that such excess power is reasonably necessary for its future use and that it has a contract with the power company for only temporary sale of such excess power and may itself use the same when its future growth in business or other causes may make it necessary to employ such excess power in the business for which it is incorporated."

On page 481 of its opinion in that case, the Supreme Court of Illinois adopted the rule in *People* v. *Pullman Palace Car Co.*, 175 Ill. 125, and applied it to right of way uses.

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*Words in brackets supplied.

In the latter case, the Supreme Court of Illinois had been called upon to decide whether a corporation could rent excess space in its office building which, to meet anticipated requirements, it had constructed larger than necessary. The Court answered the question in the affirmative.

The Railroad Trustee in the present case holds the right of way for present and future requirements flowing from the tapping of a potentially rich industrial area (R. 220). The railroad has maintained at all times its service to shippers and has performed its duty to the public. The Trustee found himself in a position to lease a small portion of the right of way to Lockwood without interrupting railroad service. He made the arrangement on a basis which permitted taking over the leased premises for actual operating purposes on thirty days' notice (R. 124, 220). Thus, under the facts, there is presented a typical case of a temporary lease or use for revenue purposes of temporary excess property or facilities. Such lease or use is within the corporate powers, express or implied. This being so, even if the Trustee held only an easement, no unwarranted burden was imposed on the servient land.

The petitioners submit, therefore, that the Circuit Court of Appeals erred in relying upon the *obiter dictum* in the *Leisy Brewing Co.* Case and in failing to adopt and apply the rule established by the cases of *People* v. *Pullman Palace Car Co.* and *Dickman* v. *Madison County Light Co.*, under which the lease challenged by the respondents was a proper use.

CONCLUSION.

It is, therefore, respectfully submitted that, as the Circuit Court of Appeals for the Seventh Circuit has decided important questions of Illinois law in a way in conflict with

the applicable Illinois decisions, this case is one calling for the exercise by this Court of its supervisory powers and that a writ of certiorari should be granted as prayed in the accompanying petition and this Court should review the decision of the court below and finally reverse it.

Respectfully submitted,

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August 13, 1942.